APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED SEPTEMBER 7, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: August 31, 2000 Decided: SEP -7 2000)

ALEXIS M. HERMAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee,

– v. –

ARTHUR GOLDSTEIN and MEDCO
ADMINISTRATORS, LTD.,

Defendants-Appellants.

Before: KEARSE, JACOBS, and STRAUB, *Circuit Judges*.

* * *

Per Curiam:

Defendants Arthur Goldstein and Medco Administrators, Ltd. ("Medco"), appeal from a final judgment of the United States District Court for the Southern District of New York, Kimba M. Wood, *Judge*, (a) ruling that they violated the Employee Retirement Income Security Act of 1974,

Appendix A

29 U.S.C. § 1001 *et seq.* (1994) ("ERISA"), by withholding sums, unilaterally determined by defendants to constitute Medco's fees, from contributions made by employers to the Solidarity of Labor Organizations Health and Welfare Fund ("Fund") to obtain employee health benefits, (b) ordering defendants to disgorge $9,525,493.16, plus interest dating from June 9, 1999, on account of their violations, and (c) permanently enjoining defendants from, *inter alia*, serving as fiduciaries or service providers to any ERISA-covered employee benefit plan. On appeal, defendants contend principally that such sums as they determined were their fees did not constitute Fund assets, and that in any event, they were not fiduciaries of the Fund within the meaning of ERISA.

We reject the contention that the moneys defendants withheld were not Fund assets substantially for the reasons stated in Judge Wood's Opinion & Order, reported at *Metzler v. Solidarity of Labor Organizations Health & Welfare Fund, et al.*, 1998 WL 477964, at *5-7 (S.D.N.Y. 1998), analyzing the terms of the documents governing the Fund. We reject the contention that defendants were not Fund fiduciaries, given our decision in *United States v. Glick*, 142 F.3d 520, 527-28 (2d Cir. 1998) (agent who exercises "unhampered discretion in setting [his own] commission rate" is a fiduciary). We see no error in the district court's determination that defendants' conduct violated ERISA.

We have considered all of defendants' contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 10, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 7247 (KMW)

CYNTHIA A. METZLER, Acting Secretary of Labor, United States Department of Labor,

Plaintiff,

– against –

SOLIDARITY OF LABOR ORGANIZATIONS HEALTH AND WELFARE FUND; EDMUNDO PEREZ; PEDRO LOPEZ; WILLIAM FAGELLO; PHILIP VERO; ARTHUR GOLDSTEIN; SOLIDARITY OF LABOR ORGANIZATIONS, LOCAL UNION 947; ASSOCIATE MEMBERS ADMINISTRATIVE SERVICES, INC.; and MEDCO ADMINISTRATORS, LTD.,

Defendants.

OPINION & ORDER

WOOD, U.S.D.J.

The Department of Labor (the "DOL")[1] sues under the Employee Retirement Income Security Act of 1974

1. Robert B. Reich, former Secretary of Labor, originally filed this action. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Cynthia A. Metzler has been automatically substituted as plaintiff.

Appendix B

("ERISA"), 29 U.S.C. 1001 *et seq.*, to enjoin acts and practices of defendants Medco Administrative Services, Ltd. ("Medco") and Arthur Goldstein ("Goldstein"), President of Medco, that allegedly violate Title I of ERISA, and to halt the extraction of fees by defendants from contributions made by employers to obtain employee health benefits from an employee benefit plan. The DOL also requests an order directing the return of previously extracted fees and barring defendants from engaging, directly or indirectly, in any transactions with ERISA-covered employee welfare benefits plans. Before the Court are cross motions for summary judgment. For the reasons stated below, plaintiff's motion is granted in part and denied in part and defendants' motion is denied in its entirety.

I. *Procedural History*

The DOL commenced this action on August 31, 1995 against defendants Solidarity of Labor Organizations Health and Welfare Fund ("SOLO Benefit Fund" or the "Fund"); Edmundo Perez and Pedro Lopez, trustees of the SOLO Benefit Fund; William Fagello, administrator of the plan; Solidarity of Labor Organizations, Local Union 947 ("Local 947"), the union sponsor of the SOLO Benefit Fund; Associate Members Administrative Services, Inc. ("AMAS"), the exclusive Employer Collective Bargaining Representative with respect to the SOLO Associate Membership Program; and Philip Vero, President of AMAS; Medco, and Goldstein. On February 27, 1997, the Secretary filed Consent Judgments with this Court as proposed final dispositions of the Secretary's complaint with respect to all defendants except Medco and Goldstein. Plaintiff Metzler

now moves for summary judgment and injunctive relief against Medco and Goldstein, and defendants Medco and Goldstein cross-move for summary judgment dismissing the complaint in its entirety.

II. *Factual Background*

The SOLO Benefit Fund was established on March 31, 1985 by Local 947, and two employers, Dress Up and Home Care Industries, Inc., both of whom had preexisting collective bargaining agreements with Local 947.[2] According to the Solidarity of Labor Organizations Welfare Trust Agreement (the "Trust Agreement"), the Fund was established to provide hospital and medical coverage to eligible employees and was to be jointly administered by representatives of Local 947 and employers. (Pl. Exh. 6.) Due to shrinkage of union membership in 1989, the trustees of the Fund instituted an "associate membership program," whereby Local 947 entered into contracts with employers of so-called "associate members" for the sole purpose of providing health benefits through the union employee welfare benefit plan, the SOLO Benefit Fund. However, these contracts did not cover other employment issues such as wages, hours, and terms and conditions of employment. In addition to these direct negotiations with employers, Local 947 also began to work through so-called "employer collective bargaining representatives" ("ECBRs") in the latter half of 1990. An ECBR, after contracting with the Fund to serve in such a

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2. Unless otherwise indicated, the facts in this section are taken from those portions of plaintiff's statement of material facts undisputed by defendants.

capacity, would then enter into separate contracts with employers, which authorized the ECBR to negotiate an "Associate Membership Agreement" on behalf of an employer with Local 947 for the benefit of its employees. Under the terms of the Association Membership Agreement, which was signed by Local 947, the employer, and the ECBR, the employer's recognition of Local 947 as the collective bargaining representative of its employees was expressly limited to "matters arising from participation of its employees resulting from the operation and administration of the SOLO Health and Welfare Fund, and for no other matters." (*See* Pl. Exh. 11; Pl. Exh. 23.)

From 1990 to 1992, Perez, while employed as Assistant Fund Administrator, selected those entities that would be permitted to market the health benefits of the Fund to employers. The first such entity was The Phoenix Agency, whose president, Dennis Grasso ("Grasso"), was an insurance broker and the employer of a daughter of Perez. During 1990 and 1991, Grasso solicited and enrolled employees to receive health benefits from the Fund as associate members of Local 947. In December 1990, Perez executed a memorandum of agreement with Associate Benefit Agency ("ABA") — a company created by Tracey Perez, another daughter of Perez who was also an employee of the Fund, and whose fiancee, Philip Vero, was made Vice President and Manager of ABA — to allow ABA to bring employers it represented as a collective bargaining representative to participate in the Fund. (Pl. Exh. 18.) After being advised by lawyers that Tracey Perez's involvement with ABA while employed by the Fund was problematic, Philip Vero formed a new

corporation, AMAS,[3] which was then recognized by the Fund's Board of Trustees as the "liason for the associate membership enrollment" on or about January 8, 1991 (Pl. Statement at ¶41; Pl. Exh. 19.)[4] On or about May 2, 1991, Perez and Philip Vero executed a memorandum of agreement under which AMAS was permitted to solicit employers for participation of their employees in the Fund through the associate membership program. On April 1, 1992, AMAS enrolled itself in the Fund's associate membership program as a participating employer, resulting in its employees receiving health benefit coverage from the Fund.

In or around March 1991, defendant Medco,[5] entered an agreement with the AMAS, under which AMAS granted Medco "access" to the Fund "for the purpose of acquiring Associate Members." (Pl. Exh. 36.) The agreement further provided that AMAS would receive a fee from Medco in the amount of $7.00 per month for each employee Medco enrolled in the Fund who obtained individual coverage, and

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3. Philip Vero was also the owner and President of AMAS.

4. On or about April 30, 1991, Philip Vero notified Local 947 that ABA was assigning its rights under its agreement with Local 947 to AMAS, and that any employers that the ABA had obtained for participation in the Fund's associate membership program would be handled by AMAS.

5. From its inception to March 1996, Goldstein served as President of Medco. The present President of Medco is Goldstein's brother, Arthur Goldstein. The only shareholders of Medco are Goldstein's spouse and sister-in-law.

$14.00 per month for each employee obtaining family coverage. At about the same time Medco and AMAS executed this agreement, Medco also entered an agreement with Perez, under which Medco was authorized to solicit employees for participation in the Fund's associate membership program. In addition to soliciting employers for participation of their employees in the Fund, Medco also enrolled itself in the Fund's associate membership program as a participating employer in March 1993, resulting in its employees receiving health benefit coverage from the Fund.

Medco's role in soliciting employers for the Fund's associate membership program can be summarized as follows. An interested employer was first required to execute an Authorization of Collective Bargaining Representative," naming Medco as the employer's "Collective Bargaining Representative." The Medco representative would then provide employers with application forms as well as medical history questionnaires to be completed and signed by participating employees. These forms were then forwarded to the Fund for assessment of the employees' medical history. If an employer's employees met the criteria established by the Fund, the Medco representative then presented that employer with an Associate Membership Agreement for its signature. The Fund was not a party to the Associate Membership Agreement; only the employer, Local 947 and Medco were parties to this agreement. However, under the Associate Membership Agreement, the employer agreed to be bound by the terms of the Trust Agreement and the rules and regulations governing the operation of the Fund, and to accept the decisions of the Fund's Board of Trustees as final and binding upon the employer and its employees. (*See* Pl. Exh. 11.)

Appendix B

The billing procedure contemplated under the Associate Membership Agreement can be described as follows. A participating employer was required to make contributions to the Fund on behalf of all its employees "in accordance with the Schedule of Benefits and the contribution amount agreed to between Medco and the Employer." (*Id.*) The Associate Membership Agreement directed the employer to pay its monthly contribution to Medco and specified that this amount includes "the monthly contributions to the SOLO Health and Welfare Fund, Local 947, Solidarity of Labor Organizations Associate Membership fees in the amount of twelve (12) dollars per covered employee per month pursuant to written authorization, and a service fee payable to Medco." (*Id.*) The monthly fees for coverage and Associate Membership in Local 947 were set by Fund's trustees and Local 947, respectively. Goldstein and Medco determined the amount of the service fee. The bill Medco sent to each participating employer did not specify the amount of the employer's total monthly contribution which constituted Medco's fee.[6] Upon receiving the lump sum of the employer's monthly contribution, Medco would deposit the payment in its own account and from such account issue a check to the Fund reflecting the amount charged for the provision of benefits, and a check to Local 947 reflecting the amount charged for association membership. Medco retained the balance as its fee.[7]

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6. Medco altered the statement sent to employers in November 1995, so that it indicated the percentage of the total amount due going to each of the following: union dues, benefit fund contribution, "service & organization," and "administration & billing." (Pl. Exh. 46.)

7. In those instances where Medco used an outside salesperson to enroll employers, Medco paid a commission to the salesperson (Cont'd)

Appendix B

III. *The Parties' Contentions*

In its motion for summary judgment, DOL takes the position that the essential factual elements needed to establish defendants' violations of ERISA, as alleged in the complaint, are not in dispute. Because defendants determined the total amount of the employer's monthly contribution and retained a portion of the employer's payment, DOL argues, defendants exercised authority and control over employee welfare benefit plan assets and are thus fiduciaries as defined by ERISA. 29 U.S.C. § 1002(21). DOL further contends that defendants are parties in interest within the meaning of ERISA, because (1) they are fiduciaries, § 3(14)(A), and (2) Medco is an employer of employees covered by the Fund and Goldstein was the President of Medco, §§ 3(14)(C) and (H). DOL maintains that the pleadings, depositions, and exhibits in the record clearly establish that defendants: (1) breached their fiduciary duty of loyalty by not acting solely in the interest of the participants and beneficiaries of the Fund, and for the exclusive purposes of providing benefits to them and defraying reasonable expenses of administering the Fund, in violation of § 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A); (2) failed to act with the care, skill, and diligence of a prudent man acting in a similar capacity, in violation of § 404(a)(1)(B) of ERISA, 29 U.S.C.

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out of the money it retained from the employer's monthly contribution payment to Medco. If the salesperson who solicited the employer on behalf of Medco used an agent, a commission was paid by the salesperson to that agent out of the commissions the salesperson received from the marketer. A portion of the amount retained by Medco also was used to pay access fees to AMAS.

§ 1104(a)(1)(B); (3) engaged in "prohibited transactions" by receiving plan assets for their own benefit, in violation of §§ 406(a)(1)(D) and (b)(1) of ERISA, 29 U.S.C. §§ 1106(a)(1)(D) and (b)(1); and (4) breached their fiduciary duties as co-fiduciaries, in violation of § 405(a) of ERISA, 29 U.S.C. § 1105(a).

In their motion for summary judgment, defendants agree that there are no material facts in dispute, but insist that the record supports their position that they cannot be held fiduciaries under ERISA. They contend that Medco performed a "non-discretionary, ministerial function, namely, dividing the amount received from employers into its contractually determined constituent parts." Moreover, they maintain that the monies retained by Medco from employer contributions as its "collective bargaining representative fee" (the "ECBR fee") were not an "assets of the plan" within the meaning of ERISA. According, they argue, defendants cannot be construed as "fiduciaries" within the meaning of ERISA, because they were never appointed to positions as fiduciaries and neither had nor exercised discretionary authority over the disposition of any plan assets. Defendants contend that, because DOL cannot establish that defendants were ERISA fiduciaries, the complaint in this action must be dismissed.[8] In addition, they submit that the Fund has suffered no monetary damages as a result of defendants' representation of employers participating in the Fund; defendants' remitted to the Fund the full coverage rate required under the Associate Membership Agreement,

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8. Defendants further insist that the material facts establish that the Fund has suffered no monetary damages as a result of Medco's representation of employers participating in the Fund.

"which was not only enough for the Fund to provide the benefits but also allowed for a tremendous increase in the new assets of the Fund." (Def. Mem. at 10.)

IV. *Discussion*

A. *Summary Judgment Standard*

On a motion for summary judgment, a court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 58 (2d Cir. 1987) (citations and internal quotation marks omitted). To prevail on a motion for summary judgment, the moving party therefore must show that there are no such genuine issues of material fact to be tried, and that he or she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Citizens' Bank v. Hunt*, 927 F.2d 707, 710 (2d Cir. 1991). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," which includes identifying the materials in the record that "it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. Once a motion for summary judgment is made and supported, the non-moving party must set forth specific facts that show that there is a genuine issue to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Although a court considering a motion for summary judgment must view all evidence in the light most favorable to the non-moving party, and must draw all reasonable inferences in that party's favor, *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 572 (2d Cir. 1993),

the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If, based on the submissions to the court, no rational fact-finder could find in the non-movant's favor, there is no genuine issue of material fact, and summary judgment is appropriate. *See Anderson*, 477 U.S. at 250.

B. *Fiduciary Status*

ERISA permits suits for breach of fiduciary duty only against a person who acts as a fiduciary with respect to a plan or trust covered by ERISA. *Acosta v. Pacific Enterprises*, 950 F.2d 611, 617 (9th Cir. 1992). Section 3(21) of ERISA provides, in pertinent part, that a fiduciary is anyone who:

> (i) . . . exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) . . . renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) . . . has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). The inquiry of the Court is guided by the principle that Congress intended this statutory definition to be broadly construed. *Lopresti v. Terwilliger*, 126 F.3d 34, 40 (2d Cir. 1997) In determining whether

fiduciary status should be assigned to an individual or entity, the primary focus is on the functions performed rather than the formal title held by that individual or entity. *Blatt v. Marshall and Lassman*, 812 F.2d 810, 812 (2d Cir. 1986); *see also Acosta*, 950 F.2d at 618 (concluding that language of § 1002(21)(A) clearly indicates that "a person's actions, not the official designation of his role, determine whether he enjoys fiduciary status"); *Galgay v. Gangloff*, 677 F. Supp. 295, 302 (M.D. Pa. 1987) (noting legislative history reveals Congress sought "to codify the traditional principles of fiduciary responsibility from the law of trusts" and "adopted a broad, functional definition of the term" in order to further this purpose). Courts have stressed that a person need not have "absolute discretion with respect to a benefit plan to be considered a fiduciary." *Blatt*, 912 F.2d at 812; *see also American Federation of Unions v. Equitable Life Assurance Soc'y*, 841 F.2d 658, 663 (5th Cir. 1988). Fiduciary status is properly assigned where an individual or entity is shown to exercise "any authority or control respecting . . . diposition of [a plan's] assets." *Blatt*, 812 F.2d at 813.

As both parties recognize, defendants' liability under ERISA hinges on the question of whether or not the monies retained by Medco as its ECBR fee constitute "plan assets" within the meaning of ERISA. For if defendants exercised no authority or control respecting the management or disposition of any plan assets they are not "fiduciaries" within the meaning of ERISA and cannot be subject to the standards of conduct ERISA imposes on fiduciaries.

The ERISA statute provides no definition of the term "plan asset," and the DOL has not defined the term by

regulation in the context of employer contributions on behalf of employees for health benefits. However, the regulations do provide that determinations of what constitutes a plan asset should be "based on ordinary notions of property rights under non-ERISA law and the terms of any contract to which the plan is a party." *See* Proposed Regulating Relating to the Definition of Plan Assets, 50 Fed. Reg. 961 (January 8, 1985) at 962. As plaintiff correctly notes, courts have adopted two approaches to deciding what constitutes a plan asset: (1) a documentary approach, looking to the documents governing the relationship between the Fund and the employers as the foundation for determining whether the item at issue is an asset of the plan, *see, e.g. Galgay*, 677 F. Supp. at 301, and (2) a functional approach, assessing whether the item in question "may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries." *See, e.g., Acosta*, 950 F.2d at 620. After reviewing the record in this case, the Court finds that both of these approaches lead to the same conclusion: that the moneys received from employers and retained by Medco constitute assets of the Fund.

1. Analysis of governing documents

Defendants contend that the moneys with which they were dealing when they set the amount of the ECBR fee were not assets of the Fund. Without citing any specific language from any of the documents governing the relationship between employers and the Fund, defendants generally maintain that the "existence" of the ECBR's fee was disclosed to all parties as an amount collected from employers in addition to the coverage rage and that the Fund

thus has no "right" to the fees retained by Medco. However, plaintiff has pointed to language in the Trust Agreement and the Associate Membership Agreements which it argues establish that the total amount of the employer contribution paid to Medco is an asset of the Fund.

In reviewing these documents, the Court observes that Section 2.19 of the Trust Agreement defines "Trust Fund" to mean "the Trust herein established and the sum of the contributions made by the contributing party and held by the Trustee in a trust created hereby, increased by the profits and income thereon and decreased by any losses and reasonable expenses incurred in the administration of the Trust and any payments made therefrom under the Plan." (*See* Pl. Exh. 6, 7.)[9] Moreover, section 3.1 of the Trust Agreement defines "contributions to the Trust" as payments made by participating employers "in the amounts set forth in their agreements with the Union for the services in said Agreements provided." (*Id.*) These agreements, styled as Associate Membership Agreements,[10] identify the employer's "contributions to the Solo Health and Welfare

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9. More specifically, the Trust Agreement provides that "all expenses and charges incurred in the administration and operation of the Health Care Plan and Trust Agreement, the Administrators or other agents or professionals employed or retained pursuant hereto, shall be paid out of the assets of the Trust Fund. (*Id.*)

10. As noted above, under these Associate Membership Agreements employers agreed to be bound by the provisions of the Trust Agreement and the rules and regulations governing the operation of the Fund and the decisions of the Board of Trustees of the Fund. (Pl. Exh. 11.)

Fund . . . on behalf of all employees" as the payment made "in accordance with the Schedule of Benefits and the contribution amount agreed to between Medco and the employer." (Pl. Exh. 11.) The Associate Membership Agreements further provide that this "contribution amount" includes the following components: "monthly contributions to the SOLO Health and Welfare Fund, Local 947, Solidarity of Labor Organizations Associate Membership fees . . . and a service fee payable to Medco." (*Id.*)

Insofar as the Associate Membership Agreements set out these components, this case may be thus be distinguished from *In re Consolidated Welfare Fund ERISA Litigation*, 839 F. Supp. 1068 (S.D.N.Y. 1993), where the agreements signed by employers made "no mention of the deduction of commissions or fees from the stated contribution rates." *In re Consolidated*, 839 F. Supp. at 1073. Yet the "service fee payable to Medco" was defined as a component of the "employer's contributions," which may fairly be construed from the other governing documents described above to constitute assets of the Fund. Moreover, the Court notes that the summary plan description provided to employee participants[11] and the invoices sent to clients[12] fail to make

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11. The summary plan description states:

> The SOLO Benefit Fund is a Fund that is jointly administered by an equal number of management and union Trustees for the sole benefit of Fund members. The Fund is financed by contributions made by Employers to benefit their employees. . . . The Fund makes no profit because it is a Trust Fund. Because it is

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any reference to the fees and commissions deducted by Medco from the stated employer contribution rates. Viewing the governing documents and taking these additional considerations into account, the Court concludes that the contractual language in this case establishes that the total amount of the monthly employer contributions paid to Medco constituted assets of the Fund.

2. "Assets of the Plan" from a Functional Perspective

Defendants' arguments fare no better when the question of what constitutes an asset of the Fund is considered from a functional perspective. Courts following this approach have been guided by the legislative history of ERISA, which reveals that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Massachusetts Mut. Life Ins. Co. v. Russell*,

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> administered efficiently and honestly, the members can derive greater benefits from it than they could from any commercial enterprise or benefits company.

(Pl. Mem. at 19.)

12. As noted above, the invoice was altered in 1995 to delineate the components of the employer contribution, indicating what percentage of the total amount due went to the union dues, benefit fund contribution, "service and organization" and "administration and billing." However as plaintiff rightly notes, the revised version still failed to indicate the amount Medco deducted as its fee; it is unclear whether Medco retained the sums deducted from the total contribution for "service & organization" or "administration & billing," or both.

473 U.S. 134, 140 n.8 (1985) (citing 120 Cong. Rec. 29,932, 29,951, 29,954, 29,957, 29,961, 29,194, 29,196-97, 29,206 (1974)); *see also Acosta*, 950 F.2d at 620. These courts view the congressional imposition of a broad duty of loyalty upon fiduciaries of employee benefit plans as counselling "a more functional approach" to the question of whether a particular item constitutes an "asset of the plan." *Acosta*, 950 F.2d at 620. Under this approach, courts assess "whether the item in question may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries." *Id.*

Taking this approach to the instant case, the Court finds that the item in question — employers' total contributions paid to Medco — was clearly used to benefit defendants. The total amount of the employers, contribution was set by defendants, and they retained that portion of the contribution not remitted to the Fund or Local 947. As plaintiff points out, the percentage of an employer's contribution retained by defendants was substantial; by way of example, plaintiff cites one case in which defendants retained an amount constituting more than 31% of the participating employer's monthly contribution. (Pl. Mem. at 15.) The detriment to plan participants and beneficiaries can also be established in this case, insofar as they paid higher premiums than were needed to provide benefits. (*Id.*) Defendants seek to deflect attention from this point by stressing that Medco remitted monies to the Funds in accordance with the coverage rate set by Local 947 and observing that the net assets of the Fund increased after Medco began serving as an ECBR. (Def. Mem. at 10.) But defendants' calculations fail to take

into account the extent to which they profited at the expense of plan participants and beneficiaries by exercising the discretion to set the total amount of participating employers' monthly contributions and then retaining the difference between that total and the amounts forwarded to the Fund and Local 947. In light of these considerations, the Court finds that, the monthly employers' contributions paid to Medco constitute "assets of the plan" when viewed from a functional perspective.

Because the Court finds that the amount of the employers' contributions paid to Medco constitute assets of the Fund and because defendants had set the total sum of the contribution employers had to pay (over and above the coverage rate set by the Fund and the union membership fee set by Local 947) to receive benefits through the Fund, the Court further concludes that defendants are fiduciaries within the meaning of ERISA; the record clearly indicates defendants had "discretionary authority or discretionary control . . . respecting management or disposition of [the Fund's] assets." 29 U.S.C. § 1002(21)(A).

C. *Liability of Defendants under ERISA*

Having determined that defendants are fiduciaries within the meaning of ERISA, the Court proceeds to consider plaintiff's claims that defendants, by extracting fees from contributions employers paid to obtain benefits through the Fund and diverting those assets of the Fund to their own use, (1) engaged in prohibited transactions under §§ 406(a)(1)(D) and 406(b)(1)(2) breached their fiduciary

duties under §§ 404(a)(1)(A) and 404(a)(1)(B) of ERISA; and (3) are liable as co-fiduciaries under § 405(a)(1).[13]

1. Prohibited Transactions: Sections 406(a)(1)(D) and 406(b)(1) of ERISA

Plaintiff claims that defendants Medco and Goldstein engaged in prohibited transactions under ERISA §§ 406(a)(1)(D)[14] and 406(b)(1)[15] by extracting fees from

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13. I note that defendants have not addressed the question of their liability under specific provisions of ERISA because they rest their entire argument on the premise that the service fee deducted by Medco from the employers' contribution paid to Medco is not a "plan asset" within the meaning of ERISA.

14. ERISA § 406(a)(1)(D) provides, in pertinent part:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . .

29 U.S.C. § 1106(a)(1)(D).

15. ERISA § 406(b)(1) provides, in pertinent part:

> (b) Transactions between plan and fiduciary
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> A fiduciary with respect to a plan shall not . . . deal with the assets of the plan in his own interest or for his own account . . . .

29 U.S.C. § 1106(b)(1).

contributions employers paid to obtain health benefits from the Fund and diverting those Fund assets to their own use.

The *per se* prohibitions identified in § 406 of ERISA, 29 U.S.C. § 1106, are designed to prevent categories of "insider" transactions which Congress believed offered an especially high potential for abuse of plan assets. *Cutaiar v. Marshall*, 590 F.2d 523, 529 (3d Cir. 1979). Section 406(a) prohibits a fiduciary from causing the plan to enter into or maintain transactions with categories of "parties in interest," a term defined by § 3(14), 29 U.S.C. § 1002(14)[16] to include any fiduciary and any employer of employees covered by the plan or an officer or director of such employer. *Brock*, 8 Employee Benefits Cas. (BNA) at 2308. Section 406(b) prohibits a fiduciary from acting in conflict-of-interest situations, including dealing with plan assets in their own

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16. ERISA § 3(14) provides in relevant part:

> The term "party in interest" means, as to an employee benefit plan —
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> (A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;
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> (B) a person providing services to such plan;
>
> (C) an employer any of whose employees are covered by such plan. . . .

29 U.S.C. § 1002(14).

interest and acting on behalf of the plan in situations where they have an adverse interest or on behalf of another party whose interest is adverse. *Id.*

In order for a particular transaction to run afoul of § 406(a)(1)(D), it must involve (1) a transfer (2) to a party in interest (3) of plan assets. *Liss v. Smith*, 991 F. Supp. 278, 293 (S.D.N.Y. 1998). The parties in interest involved here are Medco and Goldstein. Medco is a party in interest because its employees receive benefit coverage through the Fund, 29 U.S.C. § 1002(14)(C), and Goldstein, because he is a person who provided services to the Fund, 29 U.S.C. § 1002(14)(B).[17] Having found that the total employers' contributions paid to Medco constitute assets of the Fund, the Court further finds that defendants, deduction of fees from this total amount paid by employers is a transaction proscribed by § 406(a)(1)(D) of ERISA.

With respect to § 406(b), the Court notes that the Second Circuit Court of Appeals has counseled in favor of broad construction of its provisions in order to protect beneficiaries and provide notice to fiduciaries of prohibited transactions. Such liability is imposed even where there is "no taint of scandal, no hint of self-dealing, no trace of bad faith." *Id.* (quoting *Cutaiar*, 590 F.2d at 528). In light of the Court's finding that the fees retained by defendants in their own interest or for their own account constituted assets of the Fund, defendants are further found to have acted in violation of § 406(b)(1) of ERISA.

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17. Goldstein served in this capacity from April 4, 1991 through March 1996. (Pl. St. ¶¶ 48-50.)

Appendix B

2. Breaches of Fiduciary Duty: Sections 404(a)(1)(A) and 404(a)(1)(B)

Section 404(a) of ERISA, 29 U.S.C. § 1104(a), sets forth the fiduciary's basic duties, which derive from traditional principles of the law of trusts. *Brock v. Ardito*, 8 Employee Benefits Cas. (BNA) 2303, 2307 (E.D.N.Y. 1987) The Second Circuit Court of Appeals has stated that sections 404(a)(1)(A) and 404(a)(1)(B)[18] "impose three different although overlapping standards":

---

18. Sections 404(a)(1)(A) and 404(a)(1)(B) provide, in pertinent part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

29 U.S.C. §§ 1104(a)(1)(A)-(B).

Appendix B

> A fiduciary must discharge his duties "solely in the interests of the participants and beneficiaries." He must do this "for the exclusive purpose" of providing benefits to them. And he must comply "with the care, skill, prudence, and diligence under the circumstances then prevailing" of the traditional "prudent man".

Donavan v. Bierwirth, 689 F.2d 263, 271 (2d Cir. 1982). Measuring the actions of the defendants in this case against the standards of care and prudence set forth by the Second Circuit, this Court finds that defendants have clearly violated their fiduciary duties under §§ 404(a)(1)(A) and 404(a)(1)(B) of ERISA. Defendants failed to take action with respect to the Fund "with an eye single to the interests of the participants and beneficiaries," *See Donovan v. Bierwirth*, 680 F.2d at 271, insofar as they acted in their own interest in setting the total amount of the contribution employers were required to make in order to obtain employee benefits through the Fund. Moreover, in calculating the total amount of the employers, contributions, defendants clearly did not act with the "exclusive purpose of defraying reasonable expenses of administering the plan," as required under the statute. 29 U.S.C. § 404(a)(1)(A).

The Court further finds that the summary judgment record supports the conclusion that defendants' actions also constitute a breach of defendants' fiduciary duty of prudence. Prudence is measured according to the objective "prudent person" standard developed in the common law of trusts. *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984) (quoting *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983));

see also United States v. Mason Tenders Dist. Council of Greater New York, 909 F. Supp. 882, 885 (S.D.N.Y. 1995). ERISA's prudence standard "is not that of a prudent lay person but rather that of a prudent fiduciary with experience dealing with a similar enterprise." *Id.* (quoting *Marshall v. Snyder*, 1 Employee Benefits Cas. (BNA) 1878, 1886 (E.D.N.Y. 1979)); *see also Donovan v. Mazzola*, 716 F.2d 1226, 1231-32 ("Courts have also recognized that in enacting ERISA Congress made more exacting the requirements of the common law of trusts relating to employee benefit trust funds."). The summary judgment record in this case adequately supports the conclusion that defendants failed to act as would prudent fiduciaries having experience dealing with a similar enterprise. The retention by defendants of Fund assets as fees, which the Court found above to constitute prohibited transactions under § 406 of ERISA, resulted in losses to the Fund for which defendants is liable under § 404(a)(1)(B). *See, e.g., Sandoval v. Simmon*, 622 F. Supp. 1174, 1215 & n.3 (D. Ill. 1985) (quoting Joint Explanatory Statement of the Committee of Conference, House Conference Report No. 1280, 93d Cong., 2d Sess.; citing *Herman v. Painting Industry Insurance Fund*, No. 77 Civ. 1490, slip op. at 3 (S.D.N.Y. 1981)).

3. Liability for breach of co-fiduciary: Section 405(a)

Finally, the Court considers plaintiff's claim that defendants are each liable under § 404(a)(1) of ERISA for the fiduciary violations of §§ 404(a)(1)(A), 404(a)(1)(B), 406(a)(1)(D) and 406(b)(1) of ERISA committed by the other, as co-fiduciaries. Section 404(a)(1) of ERISA renders a fiduciary vulnerable to liability for breaches committed

by other fiduciaries "if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or a duty to the plan, (2) that the fiduciary knowingly participated in the breach or undertook to conceal it, and (3) damages resulting from the breach. *See Diduck v. Kaszycki & Sons Contractors*, 974 F.2d 270, 281-82 (2d Cir. 1992); *see also Silverman v. Mutual Benefit Life Ins. Co.*, 941 F. Supp. 1327 (E.D.N.Y. 1996). While plaintiff's briefing of this point is relegated to a footnote, (*see* Pl. Mem. at 32 n.8), the Court finds that the summary judgment record provides a sufficient basis for establishing defendants' liability under § 405(a)(1). As has been concluded above, both Medco and Goldstein breached a duty to the Fund and each acted with the knowledge of the other's activities. Moreover, insofar as defendants' breach consisted of deducting Fund assets from employers, contributions as their fee, there was clearly damage to the Fund. Accordingly, the Court grants summary judgment to plaintiff as to their claims against defendants under § 405(a).

D. *Remedies*

To remedy defendants, violations of ERISA, plaintiff seeks injunctive and other equitable relief in the form of an order of the Court: (1) correcting the prohibited transactions; (2) restorating to the Fund of all losses incurred as a result of the fiduciary breaches they committed, plus interest (including prejudgment interest); and (3) enjoining defendants from violating ERISA and from ever serving as fiduciaries or service providers of fiduciary breaches they committed, plus interest (including prejudgment interest); and (3) enjoining defendants from violating ERISA and from

ever serving as fiduciaries or service providers of any employee benefit plan, pursuant to § 409(a) of ERISA, 29 U.S.C. § 1109.

Section § 409(a) provides, in pertinent part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

29 U.S.C. § 1109(a). Under the circumstances of this case, the Court finds that the relief requested by plaintiff is reasonable in all respects. However the Court finds that an inquest is required to determine the damages assessable against Medco and Goldstein. According, this action is hereby referred by Magistrate Judge Ellis for this purpose. The parties are directed to contact Magistrate Judge Ellis' Chambers by August 31, 1998 to schedule further proceedings in this matter.

V. *Conclusion*

For the reasons stated above, plaintiff's motion for summary judgment is granted in its entirety and defendants'

motion for summary judgment is denied in its entirety. This matter is hereby referred to Magistrate Judge Ellis for an inquest to determine the damages assessable against Medco and Goldstein. The parties are directed to contact Magistrate Judge Ellis' Chambers by August 31, 1998 to schedule further proceedings in this action.

SO ORDERED.

DATED: New York, New York
August 10, 1998

s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

APPENDIX C — FINAL JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 22, 1999 AND FILED OCTOBER 26, 1999

HONORABLE KIMBA M. WOOD
Civil Action File No. 95-CIV-7247

Mark A. Holbert
Office of the Solicitor
U. S. Department of Labor
201 Varick Street, Room 707
New York, New York 10014
Tel. 212/337-2094
MH (3940)

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 95 CIV 7247 (KMW)

ALEXIS M. HERMAN, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

SOLIDARITY OF LABOR ORGANIZATIONS HEALTH AND WELFARE FUND; EDMUNDO PEREZ; PEDRO LOPEZ; WILLIAM FAGELLO; PHILIP VERO; ARTHUR GOLDSTEIN; SOLIDARITY OF LABOR ORGANIZATIONS, LOCAL UNION 947; ASSOCIATE MEMBERS ADMINISTRATIVE SERVICES, INC.; and MEDCO ADMINISTRATORS, LTD.,

Defendants.

Appendix C

FINAL JUDGMENT AND ORDER

This matter having come before this Court on cross motions by Plaintiff Alexis M. Herman ("the Secretary") and Defendants Arthur Goldstein and MEDCO Administrators, Ltd. for summary judgment, and this Court, on August 10, 1998, having issued an Opinion and Order granting the Secretary's motion and having denied the Defendants' motion, and this Court finding the relief sought by the Secretary to be reasonable in all respects, and this Court having referred for inquest the determination of damages, and this Court, on July 16, 1999, having entered an Order adopting, in its entirety, the June 9, 1999 Report and Recommendation issued as a result of such inquest, and finding Defendants Arthur Goldstein and MEDCO Administrators, Ltd. jointly and severally liable for losses suffered by the Solidarity of Labor Organizations Health and Welfare Fund, and consent judgments having been entered with respect to all other defendants to this action,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Judgment is entered against Defendants Arthur Goldstein and MEDCO Administrators, Ltd. jointly and severally in the amount of $9,525,493.16, plus $2,112.55 interest for each date after June 9, 1999, as restitution to the Solidarity of Labor Organizations Health and Welfare Fund, and as correction of all prohibited transactions. Such restitution shall be made by Defendants Arthur Goldstein and MEDCO Administrators, Ltd. to the Solidarity of Labor Organizations Health and Welfare Fund, which was named

as a defendant, pursuant to Rule 19(a) of the Federal Rules of Civil Procedure, solely to assure that complete relief could be granted. Defendants Arthur Goldstein and MEDCO Administrators, Ltd. shall provide notice to the Secretary of all restitution made pursuant to this Judgment and Order by sending written notice of all payments to the Pension and Welfare Benefits Administration, U.S. Department of Labor, U. S. Customhouse, 6 World Trade Center, Room 625, New York, New York 10048, within five (5) days of deposit.

2. Defendants Arthur Goldstein and MEDCO Administrators, Ltd. are permanently enjoined from committing or knowingly participating in any future violations of Title I of the Employee Retirement Income Security Act, as amended 29 U.S.C 1001, *et seq.* ("ERISA").

3. Defendants Arthur Goldstein and MEDCO Administrators, Ltd., and any corporate successor to MEDCO Administrators, Ltd., are permanently enjoined individually and collectively from directly or indirectly, or through any agent, entity or individual, from serving as fiduciaries or services providers to the Solidarity of Labor Organizations Health and Welfare Fund, and for any other employee benefit plan covered by ERISA, including engaging in any of the following conduct:

> (a) Providing or rendering to any employee benefit plan services of any kind, including but not limited to, consulting, advising, providing brokerage services, representing, making recommendations, bringing any investment to the attention of any employee benefit plan, accounting, or bookkeeping;

(b) Selling, leasing, or otherwise transferring for consideration any interest in any property to any employee benefit plan;

(c) Receiving any compensation, consideration, or anything of value from any employee benefit plan, except a benefit received as a participant of a plan to which defendant has a lawful entitlement, and then only in the amount and in the same circumstances as would any other similarly situated participant;

(d) Soliciting on behalf of himself or others, any person defendant knows or has reason to know is an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, adviser, provider of goods or services, consultant, or representative in any capacity of any employee benefit plan, concerning the employee benefit plan's acquisition or use of goods, services, investments, or other property, or relating in any way to the disposition or use of plan assets;

(e) Serving as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, adviser, provider of goods or services, consultant, or representative in any capacity, or serving in any capacity that involves decision making authority or custody or control of the monies, funds or assets, of any employee benefit plan; or

(f) Making any recommendation to, providing any advice to, bringing any investment to the attention of, or in any way facilitating or encouraging any investment by, any person or entity where defendant knows or has reason to know that person or entity or any other person or entity may use any such information, advice, or recommendations in connection with transactions involving employee benefit plans.

5. Costs are awarded to the Plaintiff.

6. This Court shall retain jurisdiction of this matter for purposes of enforcing the terms of this Final Judgment and Order.

The Clerk of Court is directed to close this case.

DATED: New York, New York
October 22, 1999

s/ Kimba M. Wood
KIMBA M. WOOD
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 22, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of December two thousand.

Dkt No: 99-6364

Herman

v

Goldstein

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Arthur Goldstein & Medco Administrators

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

Appendix D

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX E — RELEVANT STATUTES

29 U.S.C. § 1004

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as

such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) —

(A) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(B) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of —

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

Appendix E

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement —

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement —

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection —

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

29 U.S.C. § 1105

§ 1105. Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b) Assets held by two or more trustees

(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees —

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which

event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons

other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that —

(A) the named fiduciary violated section 1104(a)(1) of this title —

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided

in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

(d) Investment managers

(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

29 U.S.C. § 1106

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.